United States Court of Appeals
Eighth Circuit

Allan C. Mugan,
Appellant,

V.

RE.' 10-1808

United States of America,
Appellee.

Petition For Rehearing
and Rehearing En Banc
F.R.App.P. 40

Comes Now Allan C. Mugan (movant) unrepresented/pro-se to petition the Honorable Eighth Circuit for Rehearing by the panel and Rehearing En Banc of the cause of action captioned above.

In support of this petition, Movant states as follows:

Nature of Proceedings

On August 27, 2007 Movant filed a petition for a writ of

Habeas Corpus pursuant 28 U.S.C. ss 2255 in the Northern District of Iowa, United States District Court.

After response by the government and traverse by Movant, the action was denied by the district court on March 29, 2010.

Movant filed for articulation because the District Court failed to make any findings of fact or conclusions of law. The motion was denied.

Movant then applied to this circuit for a certificate of appealability (COA) claiming all the issues set forth in his 2255 as grounds for relief, as well as the failure of the district court to make any findings of fact or conclusions of law. The COA was denied without opinions on October 4, 2010.

Movant avers that either he was not specific enough to alert this panel the errors of the District Court or that this court has overlooked or misapprehended the intent of movant. Movant feels he is compelled to submit the facts, put forward the evidence and exhibit the caselaw in a more approachable manner so this panel has a clear comprehension as to how his

constitutional rights have been violated. Also that which will allow the Eighth Circuit to grant the requested COA.

It appears that the district court made the following determinations:

Pages 1 & 2 of the March 29, 2010 order states that an evidentiary hearing is at the discretion of the district court and she must determine whether my alleged facts, if true, would entitle me to relief. Also that if she accepted them as true and they still would not entitle me to relief, that therefore an evidentiary hearing is unnecessary. Hearing is also unnecessary where allegations, accepted as true contradict the record, are inherently incredible, are conclusions or lack factual evidence. The district court continues with -- stated differently, my 2255 can be dismissed, without hearing, where the files and records "conclusively" show I'm entitled to no relief. She concludes she can resolve my claims from the record (but totally ignoring all the new evidence I submitted). Then she states the record "conclusively shows" my ineffective assistance of counsel claims to be meritless.

Regarding any merit, she deters her opinion as agreeing with all the reasons set forth in the government's resistance.

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In the government's resistance the district court states it was determined that all of my claims were procedurally defaulted. Hence, the impasse.

Because of the table, my only alternative to my previous filings is specifically attacking the district court's assessment that I was given effective assistance of counsel (IAC). My claims are not conclusory (evidence has been provided).

"Conclusively" means irrefutable, unquestionable. Movant proclaims his claims of ineffective assistance of counsel were demonstrated with factual evidence, most of which never viewed by the court before. Therefore the district court's determining my claims baseless is indeed questionable given these facts.

The 8th circuit holds, "Issues regarding ineffectiveness of counsel often require a hearing" to consider evidence not disclosed "on the face of the trial record." Remand is necessary where the record is inconclusive on a claim for IAC. Absent clarity, an evidentiary hearing is required. See Nelson v. United States, 2008 U.S. App. LEXIS 22388 (8th Cir.).

Because court appointed counsel was also ineffective for failing

to develop the record for the district court, then on appeal, Movant's IAC claim, he has the right under due process to raise the issue in his 2255 and also to an evidentiary hearing so the vast amount of evidence securing the claim can be properly presented for the Court's reasonable application of the law.

The district court's only apparent justification in denying my IAC claims would appear to be that my allegations (true or not) are contravened by the existing record. Notably, however, there is no identification of those portions of the record which allegedly would contravene the allegations of IAC set out in my 2255.

The other reason for denial is because the court agreed 100% with the government in its resistance motion authored by an intern student.

The Northern District of Iowa has ~~An Order, 2006 U.S. Dist. Lexis 66244,~~ stated, that in an examination for IAC, the Court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. EX/EX

Movant provides the totality of counsel's ineffectiveness to

ensure "all" the circumstances are presented and all of his/hers acts ~~actions~~ and/or omissions which were outside the range of professional effective counsel, whereby the outcome of certain proceedings and confidence in the constitutional conviction have been undermined.

Sixth Amendment Standards of Review

1. Standards adopted by the Supreme Court -- Strickland and Cronic

Standard for Ineffective Assistance of Counsel

(A) (8)

Strickland v. Washington, 466 U.S. 668, 80 Led.2d 674 (1984) p. 2063: The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970).

My claim that both retained and court-appointed counsel's assistance was so deficient/defective as to require reversal of sentencing & conviction has two components. [Two part test]. First, I understand the court needs me to show counsel's performance was deficient. A requirement of a showing that counsel made errors so serious that he/she was not functioning as the "counsel" guaranteed me by the Sixth Amendment. Second, I need to show that the deficient performance prejudiced my defense. Which requires showing the confidence in the outcome has been shaken or is not reliable.

Presumed Standard For Prejudice.

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U.S. v. Cronic, 80 L.ed 2d 657 (1984)

It is important to note the Supreme Court pointed out specifically that defendant was appointed an attorney with a real estate practice who had little time to investigate while the government (and its vast resources) had over 4 years.

page 2047: The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Footnote 25. "The Court has uniformly found constitutional error without any showing of prejudice when counsel was totally absent, or prevented from assisting the accused during a critical stage of the proceedings."

Before it became known the instant charges had become of federal interest, I retained counsel McGuire to protect my family from the clutches of DHS (Department of Human Services). McGuire was my worker's comp. attorney's law partner, which created an automatic conflict of interest, unbeknownst to me.

My family's house was searched when, out of vengence, my son & niece conspired to fabricate a fiction of child abuse. Police gave false

(9)
(10)

Facts, Evidence and Exhibits

Retained counsel Mr. McGuire was ineffective at the following critical stages:

Counsel McGuire lured me into retaining him under false pretenses. His law partner was representing me in a worker's comp action. At the time McGuire was retained, his partner was at $127,000.00 in settlement negotiations. This became, unbeknownst to me, an immediate conflict of interest as McGuire only took the case so he could tax against the proceeds of the settlement.

Proof of this lies in the fact that McGuire has never been an adversary in a federal criminal complaint. He had no knowledge of federal rules of procedure, federal rules of evidence, United States Sentencing Guidelines or appellate procedure. I proved these things to the district court by way of McGuire's billing statement, his filing a ninth circuit case, claiming a dismissal was appropriate based on that circuit's findings, his filing an appeal to the Eighth Circuit without a final judgment. I proved by way of McGuire's first motion to withdraw because of money and how he stole over $57000 from the settlement trust account AFTER I voided the power of attorney and rescinded the attorney-client

relationship. I proved McGuire's law firm doctored a letter to the work comp attorney to make it appear McGuire knew I had settled the work comp claim for only $60,000.00 before agreeing to represent me. McGuire had a professional responsibility to know federal law before agreeing to representation.

McGuire had a duty to investigate the search warrant and it's probable cause and legality. By way of McGuire's billing statement I proved he never questioned the illegal search & seizure nor the police, ~~witnesses~~ complainants or any aspect of the police officer's inadequate investigation.

By way of the search warrants, documents, its affidavits, the falsehoods therein, and the lack of probable cause therein and no particularity therein, I showed the court it was unreasonable for McGuire to not investigate the Fourth Amendment issues. It was unreasonable and a part of no strategy to not request a suppression hearing.

McGuire had a duty to investigate the government's so-called evidence in this matter. By way of McGuire's billing statement I proved he never investigated

the alleged evidence. He never questioned any chain of custody, origination, possibilities of alteration/contamination, or how the police created their "digital evidence." He never questioned police, the postal inspector nor the government or any aspects of the alleged evidence. I proved by way of the illegal search the alleged evidence was inadmissable. I proved by police documents and statements that there was no chain of custody and that police procedure contaminated any alleged evidence and that digital photos are very very easily altered. I proved the postal inspector had no idea where the images came from. Because of the numerous ways the alleged evidence should have been found to be inadmissable there are numerous is no reasonable strategy that would allow counsel to opt to forego any investigation into that evidence.

McGuire had a duty to investigate federal entities involvement in the state of Iowa investigation. Again, by way of McGuire's billing statement I proved McGuire never once questioned the federal government or the federal postal employee. I proved that the postal inspector had no authority to investigate

alleged state of Iowa criminal conduct which was merely alleged to have occurred solely within a private residence. Counsel was totally unreasonable in not looking into whether a federal entity acted appropriately in this matter and, this could not be a part of any tactical strategy.

I proved by way of McGuire's billing statement that he conducted no investigation whatsoever. The billing statement shows how counsel spent all of his time in his representation during this matter. Attached is a copy of that billing statement that I provided to the District Court. Counsel shows billing for virtually every minute he utilized his efforts in his "adversarial" position in this representation. Please examine this document now. Notice there are very many "conferences" "telephone conferences." Those phone calls were with either myself, the government, the postal inspector or an agent within the govt, or about the settlement. The statement shows also he spent time travelling, he reviewed some photos, the grand jury testimony and researched the motion to dismiss the indictment, based on the Ninth circuit case "the govt. provided" him. The statement also shows every expenditure

accumulated in regards to the representation.

Not present in Counsel's billing statement is the investigations he should have performed mentioned above. Also missing is any investigation of any witnesses. It is not reasonable and certainly part of no professional strategy to question absolutely nobody. My daughter "called him" to tell him her dad is not like what he's been accused of. My brother "called him" to ask ~~of consequence of~~ about prison time. gone Not present in the statement is an investigation into the charges presented in the indictment, the time frame or the elements of ~~misconduct~~ behavior/ conduct which was encompassed in the indictment. It is not reasonable to not investigate the indictment/charges to ascertain what needed to be proven or how to defend against the accusations.

A part of the record shows McGuire was totally absent from the arraignment on April 18, 2010 although he was retained by me on April 10, 2010. I was made to appear at the hearing with a federal public defender. The record states I "will" be retaining counsel McGuire, which was a falsehood. Even though the error may be

construed as harmless as I was indeed represented, it still proves my retained counsel was absent and I was forced to proceed at a critical stage of the proceedings without the counsel of my choice, (retained counsel McGuire). which also proves my retained counsel was ineffective for failing to represent me during a critical stage.

A part of the record, detention hearing transcripts, shows retained counsel did appear for representation at the detention hearing. Said transcripts show McGuire was ill-prepared for the proceeding and had no clue of allowable hearsay testimony or evidence. Because of McGuire's ineffectiveness I was ordered detained, for the most part, because the government presented evidence of a past conviction in the state of Iowa which never existed. I proved the government's misconduct by presenting the real conviction orders of an Iowa magistrate. I was jailed and which not only presented a liberty interest but seriously hindered my ability to prepare and assist in my defense. (my counsel was over 150 miles away)

Not part of the record is the government's rush to conviction by way of a government sponsored / authored plea agreement on May 1, 2003 some two

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weeks after the arraignment. The government demanded the agreement be accepted (in full) by noon May 9, 2010. This wasn't a negotiable contract, merely a notice of demand. McGuire was unaware of the plea agreement as he was on vacation the last week of April through the first week of May. While McGuire was on vacation and during the time the government's demand was in limbo, McGuire stopped in Des Moines to view the government's only evidence (the images produced by Hampton police & faxed to the postal inspector). McGuire then reviewed the grand jury transcripts where he developed a viable defense strategy on May 8, 2010. Meanwhile, I possess this document inside a county jail which states it needs to be accepted by May 9, 2010 and I am absolutely lost as to its meaning. ~~or it should sign it and have the case close~~ I was totally without an adversary. The due date, May 9th, Counsel McGuire shows up at the county jail, after viewing the only evidence and reviewing the grand jury testimony, and tells me he won't accept the plea agreement because my wife's identification of a picture was not 100% and he found a case in California that had been dismissed. He assured me my troubles were nearly over & I'd go home soon. I took him at his

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ward as I was paying him for what I thought was his "knowledgeable" assistance.

According to McGuire's billing statement, and the docket sheet and any added discovery provided by the government, nothing informative developed between his visit May 9th and May 21, 2010 (the time the government demanded a 2nd plea agreement be signed. However, there was a phone call between McGuire and the government on May 20, 2010 wherein the Asst. U.S. Attorney told McGuire he was prepared resending the plea agreement offered before and if it was refused he would add an obstruction of justice charge. (a charge he couldn't prove).

McGuire filed his frivolous motion to dismiss the indictment on May 15, 2010,

It was ineffective and unreasonable for counsel to decide for himself (the day the 1st plea agreement was due) without discussing its terms, the advantages of pleading vs. going to trial (or any aspect of the offer) with me. Counsel never once explained any part of the agreement. He was so sure of himself getting the indictment dismissed he never discussed any consequences or advantages.

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Had I been told the government could possibly win their case I may have took it upon myself to learn of the paragraphs in the plea agreement. I may have accepted the deal wherein I was offered a 3 point reduction for acceptance and no upward departure for obstruction. At the time of the first offer the resulting mandatory guideline like sentence was under 10 years. But the statute carried a mandatory minimum of ten years. Because of the variance from the guideline range and the mandatory minimum the court may have very well sentenced me to the ten years. Any enhancements would have been overturned in light of Blakely. Therefore, I was prejudiced because McGuire's representation cost me 20 years ~~days~~ in consecutive imprisonment.

~~McGuire~~ Not in the record, anywhere, is there a reasonable foundation specifying any matters which may have changed McGuire's strategy of his viable defense theory or motion to dismiss, between May 9th and May 21, 2004. (The dates the first plea agreement became void and the date the 2nd agreement was faxed to McGuire, respectively). The obstruction threat was of May 20,

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was not a qualified reason to abandon the mistake of identity defense. McGuire came to Cedar Rapids to read some letters the government illegally seized from the U.S. mail stream, in violation of Fourth Amendment rights. The same day McGuire merely "dropped off" a copy of the plea agreement to the county jail and went home (180 miles away). This was May 23, 2003 and I did not know why he dropped it off. I didn't know if I was now to plead guilty or what the deal was. I only knew that I wouldn't allow my wife to be drawn into the ordeal. I thought the indictment was due to be dismissed or I'd win at trial, no harm done to anyone.

Out of the pure blue sky, counsel coerces me into the plea by telling me my wife & kids would be brought to court and the government would ask for 1-4 more years for obstruction if I didn't agree. Not understanding the agreement, I drafted my own. The 23rd was the start of the memorial day weekend. It was due to be turned in to the govt. by the next wednesday (4 days away). That left only Tuesday to discuss the offer of

the government. As per McGuire's billing the plea agreement is only mentioned being looked at by McGuire (inexperienced in federal matters) the day it was due by noon. Not being able to talk to my "adversary," he merely faxed the plea agreement to the jail. He made me sign it against my will and had a courier pick it up to deliver to the court, some 4 hrs late.

(Indent) → ~~single space~~ next 7 lines

Note: I understand this is lengthy for the reader and may seem I'm arguing the points as if on trial. However, this presentation is necessary so the fact-finders will see the constitutional violations of my rights to due process and ineffective assistance of counsel as well as the Fourth Amendment violations, the District Court and/or panel has overlooked due to my lack of understanding on how to prepare an adequate informative brief. The attached exhibits (caselaws) support my averments. Please read on. My life and justice are at hand. I did not commit this crime and there isn't now, never has been, not ever will be, any proof stating I did. I've spent almost 8 years in confinement trying to put forth the truth.

Because McGuire's law partner failed to disburse my settlement proceeds, in the manner I dictated, I rescinded the attorney client relationship as well as any power of attorney. I instructed the law firm to then mail the entire amount held in trust, to me at my home address, which the firm also refused to do. see McGuire's motion to withdraw June 4, 2003.

According to the record (Docket sheet) McGuire's motion to withdraw was then set for 12:00, June 9, 2003. ~~That before that hearing~~ I presented a motion of my own asking the court to force McGuire to continue his representation for the agreed upon price of $10,000.00.

Just before the hearing McGuire told me that the money situation was cleared up and he was appointed to be my counselor at public expense (her the c.j.a. (Which was a ploy so I'd plead guilty) He stated the government wanted to enter the plea verbally ("Judge we were all here"). Dispite my declining to do so, McGuire vehemently commanded me to do so or do 20 years in prison.

I was never instructed by counsel McGuire as to the terms of the

plea agreement, I was told to just watch him during questioning. McGuire's acts and inaction during the hearing spoke volumes of his ignorance and lack of knowledge as to what was occurring. The judge never performed any hearing to find out the reasons for the withdrawal motion or assure itself the conflict had indeed been resolved.

I proved by way of the government's memorandum of June 9 that his deceipt was obvious as it was pre-prepared and had a court scheduling included listing June 9, 2003 11:00 for the hearing. No such hearing is on the docket (record).

As I was testifying, as instructed, I had to consult with McGuire when talk of an upward departure arose. The hearing was stopped several minutes later so an understanding could be had on the consequences of pleading guilty. At the recess the government assured me no upward departures would be sought. In continuing the hearing McGuire spoke his understanding to the court that the misdemeanor would not have an impact at sentencing. The government then stated twice on the record that he don't believe the misdemeanors would result in any

departure. When being coerced to plead, a reasonable jurist can plainly see it was my understanding no upward departure would be sought based on the misdemeanor regardless of the wording in the plea agreement. This was just another deceipt by the government because only weeks later he included the misdemeanor in his offense conduct statement to the pre-sentence investigator. What's even more troubling is I presented documentation to the federal court that the conduct the govt spoke of was dismissed in state court. The state District court amended the charges and remanded to the state magistrate for disposition, which were minor fines. (They are enclosed again along with the plea agreement in the misdemeanor charges, note the attorney states I will plead guilty to the minor misdemeanor and all other charges will be dropped). These misdemeanors should never have been brought to any federal judges attention. But the government used them in presentations to the court at arraignment and throughout the entire proceedings knowing I had never pled guilty, or had been found guilty, of any statutes or codes relating to anything remotely close to what the government stated I had.

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Because of the government promising no upward departures and McGuire promising me + my family that I'd get 10 years and do 8½ and that I'd lose at trial and probably get 20 years. I was compelled to proceed with the guilty plea. I provided proof of the promises in the transcripts I provided McGuire's attorney work product proving he calculated my sentence at 10 years, maybe 11-14 with obstruction and that he never considered ANY criminal history points.

These proven FACTS, by evidence, shows my plea was anything but knowing, intelligent or voluntary. Had ~~not~~ appointed counsel researched and brough these matters at the withdrawal hearing ... the standard then for withdrawing a plea was merely a fair and just reason. Again I was prejudiced, first by incompetence during the plea stages and then because my standard for relief was increased for failure to prior develop the record at the withdrawal hearing.

(24) (25)

The day of the plea hearing McGuire (now retained by the government) went back home and deliberately stole over $5,000.00 from the settlement proceeds.

The motion to dismiss he let slide with no evidentiary hearing and when the court denied it he failed to withdraw the plea as instructed. The plea agreement stated I would not plead until the motion to dismiss was decided. Because of that I instructed McGuire to withdraw my plea if the motion was denied. Instead, McGuire filed a motion to the 8th circuit court appealing the District Court's denial. He even made me pay the $105.00 filing fee. The motion was utterly frivolous as there had been no final decision in the case thereby denying the 8th circuit jurisdiction to hear the matter. (Another display of McGuire's ignorance and lack of knowledge in a federal proceeding).

Court appointed counsel failed to investigate any [redacted] happenings prior to her appointment. She refused to withdraw the plea claiming I'd be denied the 3 point reduction. She should have known that because of the obstruction the 3 points would probably be denied anyways. She wouldn't

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investigate the search warrant or witnesses or the ineffectiveness of counsel McGuire. She relied solely on cross examination at sentencing, allowed a false criminal history to be applied by failing to submit exhibits. She failed to investigate the continuance sua sponte ordered by the court. Original sentencing was set for Nov. __, 2003. Counsel requested a copy of the change of plea hearing transcript on November 4, 2003. She received the document Nov. 17, 2003. Counsel requested a continuance of the sentencing because the 7 hour alotted was not enough time. The District Court denied the motion. The sentencing memorandum was already submitted by the government and by counsel for defense, in a timely fashion before the Nov. __, hearing per court rules.

The District Court, mere hours before the scheduled hearing, sua sponte continued the sentencing hearing to December 22, 2003. The court claims she noticed that defense counsel had requested but had not yet received the plea hearing transcripts (Hours before the hearing). But counsel "had" already received the transcript some __ days previously. I proved that [illegible]

counsel ordered the transcript and received the transcript well before the ~~con~~ sua sponte continuance from court records. I proved, by way of a letters from counsel, that nobody from the court called her to see if she had the transcripts, one of counsel's letters states she believes the "court was mistaken" when she assumed the transcript had not been delivered. One week prior to the "continued sentence" the government notifies my counsel their intent to call 3 additional witnesses.

I contend, as I cannot see any other reasonable explanation, that the District Court usurped authority by continuing the sentencing upon request of the government so that they could give the proper 7 day notice of the 3 witnesses he had just learned from the postal inspector would be in Iowa on vacation over christmas.

Counsel failed to also contest the witness list as being untimely and inappropriate. She failed to impeach the witnesses or alert the court of my Apprendi rights. She failed to ensure the government's original

people on the govts witness list would appear, she failed to negate the restitution as the use of a statement as testimony regarding restitution where my rights of cross examination were violated.

Counsel again failed to notify the court of the prior criminal history being wrong as was reported by the government and allowing the govts present witness testimony for alleged conduct never convicted for because of no evidence and conflicting statements as well as statements from relatives exonerating movant.

Counsel offered absolutely nothing in mitigation and supplied the court ahead of time with an allocution edited and typed by her paralegal and never signed or authorized by myself. She never objected to alleged excepts from illegally seized mail by the government. I proved she never prepared for the hearing by showing the court that most all attorneys never ask a question they don't already know the answer to and some of her questions harmed my defense.

This counsel also failed to file an appeal with merits

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Instead of contesting the sentencing enhancements, the application and constitutionality of the Guidelines, McGuire's ineffectiveness, the Fourth Amendment violations, or a number of other causes ... counsel chose to appeal the interstate commerce nexus of the statute. Counsel frivolously went against Eighth Circuit grain. Her efforts would have been better served contesting the Court's interpretation of "materials" as used in the statute and throughout the 18 U.S. codes (i.e. (All U.S. codes define materials as the content of what something is made of).

I have provided documents to prove my claims of ineffective assistance of counsel. It should also be noted that because counsel failed to raise the Apprendi name at sentencing I was denied resentencing when remanded by the U.S. Supreme Court. The prejudice here is obvious. Because same counsel failed to raise sentencing enhancements on appeal ... the Eighth Circuit denied my right to brief Blakely when that ruling was handed down. As the Eighth Circuit decided my appeal before the Booker opinion was issued the outcome of my appeal would have been different had counsel been effective.

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Wherefore, for all the reasons within this document ... I, Allan C. Mugan pray for relief granting a COA and remand for an evidentiary hearing before a different district court. At an evidentiary hearing I could provide dozens more exhibits supporting my claims.

under penalty of perjury this document is --

Dated: November 15, 2010

Respectfully Submitted,

Allan C. Mugan

Allan C. Mugan 08953-029
USP-Marion
P.O. Box 1000
Marion, IL 62959
unrepresented

I hereby certify that I have placed this document in the hands of prison authorities on or before November 18, 2010.

Allan C. Mugan

Precedent referenced to facts set forth in Brief

When the opinion/caselaw states, "the court must determine," it means the Court is required to make findings of fact regarding the claim. See e.g., United States v. Braiska, 2010 U.S. Dist. Lexis 11/21/10 N.D. Iowa Linda Reade, Judge - wherein the Court states, "The Court must determine which items the trooper obtained consent to search for in the van." "This finding is necessary to determine . . . "

Rothgery v. Gillespi Cnty., Tx., 128 S.Ct. 2578 (1979)
@2581: This Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty. See Brewer v. Williams, 430 U.S. 387, 398-99, 97 S.Ct. 1232 (1977)

Hamilton v. Alabama, 7 Led 2d 114 (1961)
Whatever may be the function and importance of arraignment . . . it is a critical stage in a criminal proceeding. What happens there may affect the whole trial. Available defenses may be irretrievably lost. (See also Coleman v. Alabama, 26 L.ed 2d 387 (1970))

United States v. Ferreau, 2007 U.S. Dist. Lexis 7828 D.N.D.
Inexperience may be a factor in evaluating an attorney's actual performance.

Harris v. Housewright, 697 F.2d 202 12/28/82 (8th Cir. 1982) Appeal from E. Dist. Writ of Habeas Corpus was granted where prisoner showed that his defense was prejudiced by the ineffective representation of inexperienced counsel. . .
"the primary focus must be on how well counsel performed in the particular case . . ."
"criminal defendants should not be expected to pay the steep price of counsel's education by experience."

(continued)

Harris cont.

The American Bar Association has emphasized the importance of assigning experienced counsel to criminal cases: The practice of criminal law has become highly specialized in recent years, and only lawyers experienced in [federal] trial practice, with an interest in and knowledge of [federal] criminal law and procedure, can properly be expected to serve as assigned counsel. While it is imperative that assigned counsel possess advocacy skills so that prompt and wise reactions to the exigencies of a trial may be expected, this alone is not deemed sufficient. There must be familiarity with the [federal] practice and procedure of the [federal] criminal courts and knowledge in the art of [federal] criminal defense.

United States v. Easter, 539 F2d 663 (8th cir. 1976) @665: Defendant's second contention is that he was denied due process because he had ineffective assistance of counsel. The basic argument is that defendant's appointed counsel was a civil attorney without experience in criminal cases; that he failed to file a motion to suppress the search; and that he failed to object to the introduction of improper evidence at trial.

Counsel's failure to question the search and to object to the evidence was so derelict that the claim of Ineffective Assistance of Counsel must be sustained.

Martin v. Maxey, 98 F.3d 849, (5th cir. 1996)

Counsel failed to adequately argue a motion to suppress evidence that was obtained in violation of his fourth Amendment rights or to raise that issue on appeal, and failed to obtain a preliminary hearing on the suppression issues.

State v. Reichenbach, 153 Wn2d 126, 101 P.3d 80 (2004) [Informative]
Holding that ... defendant received ineffective assistance of counsel where counsel failed to move to suppress the evidence, the court reverses. the baggie of meth was the most important evidence the state offered, yet counsel did not challenge its admissability despite serious questions about the validity of the warrant upon which the search was based.

Wannatee V. Ault, 39 F.S2d 1164 (N.D. Iowa 1999)
Court concludes that failure to advise a criminal defendant of the relevant law is "deficient performance" sufficient to satisfy the first prong of the "ineffective assistance" analysis. See Hill v. Lockhart 474 U.S. 52; see same case Wannatee v. Ault, 259 F.3d 700 (8th cir. 2001) (grant of writ affirmed)

United States v. Curcio, 680 F.2d 881 (2nd cir. 1982)
When a defendant (or counsel) raises a seemingly substantial complaint regarding counsel's conflict of interest or divided loyalty, the Supreme Court has been absolutely clear that the court MUST make a "thorough" inquiry into the factual basis for the complaint. Holloway v. Arkansas, 435 U.S. 475 (1978). That inquiry should be on the record and must be the kind to ease dissatisfaction, distrust or concern. If the court fails to make a sufficient inquiry prejudice is presumed and the S.D. of Iowa states the "reversal is automatic," See Atley v. Ault, 21 F.S2d 949 (S.D. Iowa 1998).
Because the court failed to conduct a hearing and determine the impact of the conflict of interest ... we will presume that the conflict prejudiced (defendant).

Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991)
Reasonable performance of counsel includes an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories. . . @ 712: Given this strong evidence showing counsel's complete failure to pursue a viable defense, we find trial counsel ineffective for failing to investigate the plausible defense theory. . . Grant of writ affirmed

Lawrence v. Armontrout, 900 F.2d 127 (8th Cir. 1998)
Counsel has a duty to investigate all witnesses who allegedly (sic) possessed knowledge concerning (defendant's) guilt or innocence.

United States v. Curtis, 380 F3d 1308 & 1311
Appellate Rules state a defendant's motion for leave to file a supplemental brief on appeal which asserted for first time that his sentencing enhancement was unconstitutional in wake of Supreme Court opinion — will be denied because defendant failed to raise issue in his initial brief.

At "detention hearing" hearsay and written testimony are admissible. See Gerstein, 420 U.S. at 121-22

Eldridge v. Atkins, 665 F.2d 228 (8th Cir. 1981)
On appeal to the Eighth Circuit the court reversed and stated:
"[attorney] failed to adequately investigate and provide evidence relating to a substantial defense of misidentification." [Grant the writ of Habeas Corpus.]

Rios v. Rocha, 299 F.3d 796 (9th Cir. 2002) [informative]

@805 A defense attorney's failure to consider alternate defenses constitutes deficient performance when the attorney "neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so." "Habeas Corpus must be granted."

House v. Balkcom, 725 F.2d 608 (11th Cir. 1984) [informative]

Petitioner asserts there was no investigation, no interviewing of witnesses, no preparation of a defense, no discovery, ... and no trial preparation. Additionally, House asserts that the attorneys made little use, if any, of evidence garnered ... The district court, although recognizing certain deficiencies, found no prejudice. Prejudice is not required where the ineffectiveness of counsel is "so pervasive that a particularized inquiry into prejudice would be 'unguided speculation.'" Washington v. Strickland, 693 F.2d at 1259, n.26. We so held here. The haphazard nature of [attorney] Atkins' defense, the failure to develop strategy of any consequence, and absenting themselves from crucial portions of the trial constitutes no representation at all. Given the totality of the circumstances, ineffectiveness of trial counsel has been amply shown. [writ Granted]

United States v. Matos, 905 F.2d 30 (2nd Cir. 1990) [informative]

Counsel's apparent willingness to accept the government's version of the facts at least calls into question the adequacy of his representation. [we] think that Matos is entitled to an opportunity to show that his trial counsel was ineffective and that absent such ineffective representation, there is a reasonable probability that the result of the trial would have been different. Therefore, we REMAND for an evidentiary hearing to develop a factual record on the issue of IAC.

Garmon v. Lockhart, 938 F.2d 120 (8th Cir. 1991)

Garmon received erroneous parole advice, counsel's performance was not professionally reasonable. Minimal research would have alerted counsel to the correct parole eligibility date. [petition granted]

Moore v. Bryant, 348 F.3d 238 (7th Cir. 2003) [informative]

Moore alleged that the plea was not knowing and voluntary for a number of reasons, including the erroneous advice given to him by his attorney. He alleged that his attorney had informed him that the law in Illinois was changing and that good-time credits to which he currently would be entitled were being limited. As a result of that change in Illinois law, his attorney told him that, if convicted, he would serve 85% of the sentence imposed, whereas if he pled guilty immediately, he would serve, under current Illinois law, only 50% of a 20 year sentence. Therefore, based on the advice regarding the impending revision to the good-time credit statute, Moore was faced with the prospect a 10 year sentence if he pled guilty, or a 22-27 year sentence if he proceeded to trial and was convicted. That advice was erroneous. The revision of the good-time statute was not retroactive, and the state does not present any argument that the advice was a correct interpretation of the law.

A reasonably competent counsel will attempt to learn all of the facts of a case, make an estimate of a likely sentence, and communicate the results of that analysis before allowing his client to plead guilty. When the attorney fails to do so and that failure is the decisive factor in the decision to plead guilty, the Sixth Amendment is violated and the defendant may withdraw his plea.

Therefore ... the court's rejection of his ineffective assistance claim was contrary to, or an unreasonable application of, CLEARLY ESTABLISHED SUPREME COURT LAW. [Grant of writ affirmed.]

Daniels v. United States, 54 F.3d 290 (7th Cir. 1995) [Informative]
@ 294 A conflict may arise when a client's interests are adverse to his lawyer's pecuniary interests. Therefore, Daniels is entitled to an evidentiary hearing where he may attempt to substantiate his claim.

United States v. Taylor, 139 F.3d 924 (D.C. Cir. 1998) [Informative]
Taylor claimed that trial counsel had "financially coerced" him into pleading guilty because Taylor was unable to meet counsel's "unrelenting" fee demands. Specifically, Taylor alleged that ... counsel "asked for an additional $5,000 to proceed to trial, and expressed a clear lack of interest in fighting the case when Taylor advised him that he could not pay.
Taylor claimed, trial counsel pressured him into accepting the government's plea agreement in order to dispose of the case as quickly as possible.

Jones v. Lockhart, 851 F.2d 1115 (8th Cir. 1988)
An erroneous stipulation is presumed prejudicial.

United States v. Gordon 156 F.3d 376 (2nd Cir. 1998) [Informative]
By grossly underestimating Gordon's sentencing exposure in a letter to his client, Dedes (attorney) breached his duty as a defense lawyer in a criminal case "to advise his client fully on whether a particular plea to a charge appears desirable."
Grant of new trial affirmed.

Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997)
We have no trouble concluding that the failure of Clemmons's lawyer to raise the confrontation clause claim on direct appeal was ineffective assistance of appellate counsel, and that it thus provides cause for Clemmons's failure to raise the claim on direct appeal.

United States v. Soto, 132 F.3d 56 (D.C. Cir. 1997) [Informative]
@ 59 Familiarity with the structure and basic content of the Guidelines has " become a necessity for counsel who seek to give effective representation."

United States v. Gramenos, 376 F.3d 433 (5th Cir 2004) [Informative]
Additionally, one of the most precious applications of the Sixth Amendment may well be in affording counsel to advise a defendant concerning whether he should enter a plea of guilty. "When the defendant lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to accept a plea or take his chances in court"
"By grossly underestimating [the defendant's] sentencing exposure ..., [counsel] breaches his duty as a defense lawyer in a criminal case ..."
Remanded for hearing –

Nichols v. United States, 75 F.3d 1137 (7th Cir 1996) [Informative]
If Nichols can demonstrate that (1) there was inaccurate information before the sentencing court and (2) the court relied on the inaccurate information, his sentence was imposed in violation of due process. Remanded for evidentiary hearing to determine whether sentence date was accurate.

Miller-El, 537 U.S. at 338 "A claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Houston v. Lack, 101 Lied 2d 245 (1988)
"the notice of appeal was filed at the time petitioner delivered it to the prison authorities for forwarding to the court clerk.

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Fisher v. Gibson, 282 F.3d 1283 (10th Cir 2002) [Informative]

Where an attorney accidentally brings out testimony that is damaging because he has failed to prepare, his conduct cannot be called a strategic choice: an event produced by the happenstance of counsel's uninformed and reckless cross-examination cannot be called a "choice" at all. See Strickland, 466 U.S. at 691

[Reversed and writ granted.]

Blakely v. Washington, 159 L.ed 2d 403 (2004) other than the fact of prior conviction - any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Our precedents make clear, however, that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. Reversed and Remanded for Resentencing.

U.S. v. Scott, 909 F.2d 488 (11th Cir 1990) [Informative]

@493 the trial judge impermissibly forced defendant to choose between two constitutional rights ...

Parcaro v. United States, 784 F.2d 38 (1st Cir 1986) [Informative]

Petitioner contends that he was denied effective assistance of counsel in that counsel tolerated, without comment, improper and prejudicial remarks and maneuverings on the part of the trial judge. [Remanded for evidentiary hearing before a different judge.]

Marrow v. United States 722 F.2d 525 (1985)

Marrow alleged that his guilty plea and the confession that motivated it were involuntary because they were coerced by ... threats against his long-time female companion ... He further alleged that he told his court appointed counsel about the threats and that counsel advised him to plead guilty, and to tell the judge that his plea was voluntary.

Marrow alleged in sufficient detail that his plea was coerced by threats that [Brown] would be imprisoned if he did not plead guilty. This contention involved matters outside the record of this case, and if true could lead to setting aside the guilty plea. [Therefore, remand for an evidentiary hearing.]

Each abridge case note is a faithful quote from the judge's written opinion.

Note to the Clerk of Court:

Please address my sincerest apologies to the Judges who will read the enclosed petition. I am extremely sorry I must send such a sloppy brief. I mailed a request for extension of time to the court which went unanswered. My deadline to file this brief is at hand and I have no choice but to submit what I have prepared as a draft.

Respectfully,
Allen C. Mayer

No copy of this document has been forwarded to counsel for the government. This is my ONLY copy! Please notify me of its filing.

This document enclosed is subject to prison mailbox rules as to date considered filed with the clerk of court. I certify I have placed the enclosed petition in the hands of prison authorities on or before November 18, 2010.

Allen C. Mayer

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EIGHTH CIRCUIT